Petitioner countered with his own expert testimony, (Tr. at 1116-54, 1250-54), and, ultimately, the district court instructed the jury that it had to determine whether GBL was in fact an analogue of GHB, (R. Doc. 105), which it did. (R. Doc. 107). But had the jury credited the testimony of Petitioner's experts and found that GBL was not an analogue of GHB (which would have been well within its power to do), then he would have been acquitted on that basis. So for the Government to now say that the illegality of GBL is beyond dispute is, in a word, false.

Of course, had Congress wished to categorically criminalize GBL it could have done so very simply by making it a Schedule I substance. It has not. And until it does, the Government will be put to its proofs to demonstrate that GBL is an analogue of GHB.

Furthermore, whether the congressional pronouncements specifically state that GBL is illegal is simply irrelevant. The Government claims that the congressional pronouncements are sufficient to put a defendant "*on notice* that GBL qualifies as a controlled substance analogue[.]" Resp. Br. 12 (emphasis added). But as explained in the Petition, "[t]he issue of fair notice has nothing to do with whether the Government proved, and the jury decided, that Mr. Turcotte had *knowledge* that the substance he distributed was an analogue of a prohibited substance. Rather, the issue of fair notice pertains to the unrelated issue of whether the statute was unconstitutionally vague." Pet. 16 n.3 (emphasis added). At the very most, the congressional pronouncements would be evidence that Petitioner knew of the substance's illegality but would by no means be conclusive on that point. The Government has never responded to this argument.

3. The State Of Petitioner's Knowledge Was Genuinely Contested At Trial.

The Government rightly does not contest that Petitioner presented ample evidence at trial from which the jury could have concluded, had it been instructed on the issue, that he was not aware that GBL was an analogue of a controlled substance. But in an apparent attempt to influence the Court's decision on certiorari, the Government misleadingly cites portions of the record indicating that company websites claimed that the product was the "absolute finest quality GHB precursor" and that its ingredients were "illegal nationwide." Resp. Br. 3.

As the Government must know from the record and from the explicit references to these websites during oral argument, Petitioner had no involvement in the development or content placement of this website; in fact, he did not even see what appeared on the website. Tr. at 1397, 1414. The site had been set up prior to Petitioner's becoming involved in the business; it was already in operation when he came on board in March 2000, having been set up by a friend of Mr. Brian Gore's (Petitioner's partner) and then managed by Gore himself. Tr. at 1396. Petitioner never admitted to having knowledge of the website content because he had no such knowledge.

What is more, the Government does not contest that Petitioner presented a mountain of evidence from which the jury could have found that he did *not* have knowledge that GBL was an analogue of GHB, including his own sworn testimony, the sworn testimony of a Government agent that Petitioner was "not aware of what the product was," testimony from credible experts that the GBL and GHB were not actually analogues, and more. Pet. 4. To its credit, the Seventh Circuit, though skeptical of some of Petitioner's evidence, admitted that it was incapable of "weighing contradictory evidence and making credibility determinations [which] are

functions generally reserved for the jury[,]" and, accordingly, it refused to "impute the requisite knowledge to Turcotte" based upon the various assertions made on the websites. Pet. App. 20a, n.5.

To be sure, the Government believed at trial and believes now that Petitioner was aware that GBL was a controlled substance analogue, and it presented evidence to that effect. And that is the point: the Government knew and understood its burden and presented evidence to support it, but the issue was never put to the jury as it should have been. Such an error cannot be deemed harmless under this Court's precedent. Accordingly, certiorari is appropriate.

II. THE GOVERNMENT FAILS TO CONTEST THE IMPROPRIETY OF A CONCLUSIVE PRESUMPTION ON THE ISSUE OF INTENT.

As with the first issue presented, the Government does not dispute that, if the Seventh Circuit applied a conclusive presumption that the defendant possessed knowledge that the substance was an analogue of a controlled substance, such a presumption would violate both the Fifth and Sixth Amendments. Instead, in the one sentence of analysis it dedicated to this question, the Government claims the court's decision did not rest "on the application of a conclusive presumption (which the court did not articulate) . . . ." Resp. Br. 14. But while the Seventh Circuit did not acknowledge that it was applying a conclusive presumption to overcome the failure to instruct on scienter, that is precisely what the court did.

Specifically, the court ruled that an instruction stating that the defendant knew the substance was an analogue of a controlled substance is required. Pet. App. 18a. The court also ruled that while the jury may be permitted to use certain inferences to reach a conclusion on the defendant's knowledge, "an avenue should be left open for defendants to refute such an inference." Pet. App. 19a. In other words, the jury

must ultimately decide the issue of whether the defendant had the requisite knowledge, and, as the court itself explained, the jury was instructed to "forego" making that determination. Pet. App. 20a.

Nonetheless, based upon the existence of congressional pronouncements purportedly declaring GBL illegal, the court simply *presumed* that Petitioner had knowledge of its illegality. That this presumption was conclusive is beyond dispute; Petitioner never had the opportunity to rebut this inference which was made by the Seventh Circuit. Had the Government presented this evidence at the trial court—and had the trial court instructed the jury they could make certain inferences but Petitioner had the right to rebut them—that would be an altogether different situation.

This Court's decisions are replete with statements that the Government must prove, beyond a reasonable doubt, each element of the offense with which the defendant is charged. *See, e.g., Fiore v. White*, 531 U.S. 225, 228-29 (2001); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358 (1970) (due process requires proof of each element of a criminal offense beyond a reasonable doubt). Here, before Petitioner was convicted, the jury had to decide that the substance was a controlled substance analogue and that Petitioner was aware of that fact. Pet. App. 18a. Instead, the Seventh Circuit simply applied a conclusive presumption based upon the congressional pronouncements, thereby depriving Petitioner of his right to have a jury decide the knowledge element of the offense. The constitutional implications of such a ruling are significant enough to warrant this Court's attention.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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